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In the Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1971

No. 71-227

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE ASSOCIATION OF AMERICAN RAILROADS

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement	3
Proceedings Before The Commission	4
Proceedings Before The Court Below	5
Summary of Argument	6
Argument:	
I. The Commission's Order Does Not Meet The Tests Of Reasonableness	9
A. Imposing Mandatory Observance Of Car Service Rules 1 And 2 Will Not Improve Freight Car Service, Utilization, Distribution, Or Supply	10
B. Imposing Mandatory Observance Of Car Service Rules 1 And 2 Will Be Unreasonably Injurious And Detrimental To Railroads And Shippers	13
C. Full Compliance With The Commission's Order Is Not Possible And Its Exception Provisions Do Not Afford Adequate Relief	16
II. The Commission's Order Lacks The Support Of Findings Essential To Its Validity	20
A. The Commission Failed To Make Essential Findings With Respect To Car Shortages Or Car Needs On Owners' Lines	21
B. The Commission Failed To Make Adequate Findings With Respect To The Financial Effects Of Its Order Upon The Railroads And The Shipping Public	23
C. The Commission Failed To Make The Jurisdictional Finding That Its Prescription Of Mandatory Car Service Rules 1 And 2 Was Reasonable	24

Page

D. There Are No Findings Affording A Basis Upon Which To Determine Whether The Commission's Order Comports With The National Transportation Policy 26

III. The Commission's Order Lacks Support By Substantial Evidence Of The Whole Record And Is Arbitrary And Capricious 28

A. The Commission Failed To Accord Proper Weight To The Report And Findings Of The Hearing Examiner 28

B. The Order Of The Commission Creates Discrimination And Inequities As Between Railroads 34

C. The Commission's Order Is Predicated Upon Matters Of Which It Took Official Notice Contrary To The Requirements Of The Administrative Procedure Act And Its Own Rules Of Practice 35

Conclusion 39

CITATIONS

Cases:

American Telephone & Telegraph Co. v. *F.C.C.*, 449 F. 2d 439 (2nd Cir. 1971) 25

American Trucking Ass'n. v. *United States*, 364 U.S. 1 (1960) 21

Atlantic Coast Line v. *United States*, 112 F. Supp. 594 (Ct. Cl. 1953) 9

Baltimore & Ohio R. Co. v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968) 9

Burlington Truck Lines v. *United States*, 371 U.S. 156 (1962) 9, 20-21

Chicago, Rock Island & Pacific Ry. Co. v. *United States*, 284 U.S. 80 (1931) 35

City of Yonkers v. *United States*, 320 U.S. 685 (1944) 25

Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933) 25

Florida v. *United States*, 282 U.S. 194 (1931) 20, 25

Citations, Continued.

	Page
Florida East Coast Ry. v. *United States*, 327 F. Supp. 1076 (M.D. Fla. 1971)	9, 15, 18
Glendenning v. *Ridicoff*, 213 F. Supp. 301 (W.D. Mo. 1962)	37
Interstate Com. Comm'n. v. *Louisville & Nashville R. R.*, 227 U.S. 88 (1913)	38
Interstate Com. Comm'n. v. *N.Y., N.H. & H.R. Co.*, 372 U.S. 744 (1963)	26
Iversen v. *United States*, 63 F. Supp. 1001 (D.C.D.C., 1946), affirmed *per curiam*, 327 U.S. 767 (1946)	10
Mississippi Valley Barge Line Co. v. *United States*, 252 F. Supp. 162 (E.D. Mo. 1966), appeal dismissed, 385 U.S. 32 (1966)	37
N.L.R.B. v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965)	38
New York Central Securities Corp. v. *United States*, 287 U.S. 12 (1932)	25
Northeast Airlines, Inc. v. *C.A.B.*, 331 F. 2d 579 (1st Cir. 1964)	20
Ohio Bell Tel. Co. v. *P.U.C.*, 301 U.S. 292 (1937)	38
Pacific Molasses Co. v. *F.T.C.*, 356 F. 2d 386 (5th Cir. 1966)	37
Palmer v. *United States*, 75 F. Supp, 63 (D.DC.. 1947)	10, 21-24
Roadway Express, Inc. v. *United States*, 213 F. Supp. 868 (D. Del. 1963), affirmed *per curiam*, 375 U.S. 12 (1963)	28
St. Joseph Stock Yards v. *United States*, 298 U.S. 58 (1935)	38
Schaffer Transp. Co. v. *United States*, 355 U.S. 83 (1957)	26, 28
Secretary of Agriculture v. *United States*, 347 U.S. 645 (1954)	20, 21
Sosna v. *Celebreeze*, 234 F. Supp. 28? (E.D. Pa. 1964)	37
Tagg Bros. & Moorhead v. *United States*, 280 U.S. 420 (1930)	25
United States v. *Abiline & So. Ry. Co.*, 265 U.S. 274 (1924)	38
United States v. *Baltimore & Ohio R. Co.*, 293 U.S. 454 (1935)	25
United States v. *Chicago, M. St. P. & P. R. Co.*, 282 U.S. 311 (1931)	24-25
United States v. *Cohen Grocery Co.*, 255 U.S. 81 (1921)	17
United States v. *Southern Ry. Co.*, 250 F. Supp. 759 (1966), reversed on other grounds, 380 F. 2d 49 (4th Cir. 1967)	25

Citations, Continued

	Page
Universal Camera Corp. v. *National Labor Rel. Bd.*, 340 U.S. 474 (1951)	9, 15, 29
Wichita Railroad & Light Co. v. *P.U.C.*, 260 U.S. 48 (1922)	26
Administrative Decisions:	
Blytheville Chamber of Commerce v. *Aberdeen R. R. Co.*, 259 I.C.C. 201 (1944)	37
Car Service, Freight Cars, 268 I.C.C. 687 (1947)	11
Incentive Per Diem Charges, 332 I.C.C. 11 (1967)	28, 30
Incentive Per Diem Charges—1968, 337 I.C.C. 183, sustained on re-review, *sub nom. Long Island R. Co.* v. *United States*, 318 F. Supp. 490, and reversed and remanded in *Florida East Coast Ry. Co.* v. *United States*, 322 F. Supp. 725, appeal pending in this Court, No. 70-279	30, 32
Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices (Interim Report, 1964), 323 I.C.C. 48	4, 12
St. Johnsbury Trucking Co., Inc. Extension—Heavy Hauling, 53 M.C.C. 277 (1951)	37
Watson Bros. Transp. Co., Inc.—Purchase, S. & C. Transport, 70 M.C.C. 317 (1956)	37
Statutes and Regulations:	
Administrative Procedure Act, 5 U.S.C.	
Section 553	2
Section 556	2, 28, 37
Section 557	2, 20
Section 706	2, 7
Esch Car Service Act of 1917, (54 Stat. 901)	13
General Rules of Practice and Procedure, I.C.C., Rules 75 to 87, Chapter X, 49 C.F.R. Part 1100	37
Interstate Commerce Act, 49 U.S.C.	
Section 1(13)	4
Section 1(14)(a)	2, 6-1, 9, 25-26, 28, 31
Section 1(15)	22, 28
National Transportation Policy 49 U.S.C., preceding § 1, 301, 901, 1001 (1940)	2, 6, 26-28

Citations, Continued

Page

Congressional:

Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess., June 24-25, 1969 12

Hearings Before the Senate Subcommittee on Freight Car Shortage of the Senate Committee on Commerce on S. 1415, S. 1729, S. 1730 and S. 1731, 92d Cong., 1st Sess. .. 13

Miscellaneous:

83rd Annual Report of Interstate Commerce Commission (1969) 24

84th Annual Report of Interstate Commerce Commission (1970) 24

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE ASSOCIATION OF AMERICAN RAILROADS

This brief is filed on behalf of Appellee, the Association of American Railroads (hereinafter sometimes referred to as Association), pursuant to the Rules of this Court.

OPINION BELOW

The opinion of the district court (J.S. App. 13-26)[1] is reported at 325 F.Supp. 352.

[1] J.S. App. refers to the Appendix to the Government's Jurisdictional Statement.

JURISDICTION

The judgment of the district court (J.S. App. 27) was entered on March 18, 1971, setting aside and permanently enjoining enforcement of certain portions of a report and orders entered by the Interstate Commerce Commission in an administrative proceeding identified as Ex Parte No. 241—*Investigation of Adequacy of Freight Car Ownership, Utilization, Distribution, Rules and Practices*, 335 I.C.C. 264. (J.S. App. 28-183.) Notices of appeal were filed by the Interstate Commerce Commission and United States (hereinafter sometimes referred to collectively as the Government) on May 17, 1971. (J.S. App. 204-207.) Probable jurisdiction was noted by this Court on November 9, 1971. (App. ____.)[2] The jurisdiction of this Court is conferred by 28 U.S.C. §1253.

STATUTES INVOLVED

The pertinent statutes involved are: Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. §1(14)(a) (App. ____); the National Transportation Policy, 49 U.S.C. preceding sections 1, 301, 901 and 1001 (App. ____); and Sections 553, 556, 557 and 706 of the Administrative Procedure Act, 5 U.S.C. §§ 553, 556, 557 and 706 (App. ____).

QUESTIONS PRESENTED

1. Whether the court below was correct in holding that the Commission's order prescribing mandatory Car Service Rules 1 and 2 does not meet the statutory tests of reasonableness.

2. Whether the court below was correct in setting aside and enjoining enforcement of the Commission's order for lack of essential and adequate findings.

3. Whether the action of the court below in setting aside and enjoining enforcement of the Commission's order was

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[2] App. refers to the Joint Appendix to Briefs filed with this Court.

correct on grounds of lack of support by substantial evidence of the whole record and failure to comply with other requirements of the Administrative Procedure Act and of the National Transportation Policy.

At this point it is appropriate to comment on the Government's statement of the questions presented. The subsidiary questions in the Government's brief (p. 2) contain statements that unintentionally might tend to mislead. The court below did not hold that there was a "general and pervasive shortage of freight cars on virtually all railroads," but simply referred to the Commission's finding of a freight car shortage that, in terms used by Commission counsel in oral argument, was "all pervasive." (J.S. App. 19.) Its ruling was not made in the terms of an "absence of explicit findings of shortages on individual railroads." Referring to the charts and tables in the Commission's report, the court said: "This may constitute substantial evidence of a general car shortage, but it does not support a specific finding of special car shortages on the owner lines." (J.S. App. 19-20.) Further, the court below did not hold "that the practical necessity, recognized and provided for by the Commission, for some exceptions in the day-to-day administration of the car service rules renders the rules invalid." The court said: "The admission that there cannot be complete observance of the mandatory rules is a factor which we may consider in determining the reasonableness of a regulation which is self-styled mandatory." (J.S. App. 25.)

STATEMENT

This is an appeal from a final judgment entered on March 18, 1971, by a three-judge U.S. District Court, 325 F. Supp. 352 (J.S. App. 13-27), setting aside and enjoining enforcement of certain portions of a report and orders entered by the Commission in a proceeding entitled Ex Parte No. 241, *Investigation of Adequacy of Railroad Freight Car Ownership, Utilization, Distribution, Rules and Practices, supra.* (J.S. App. 28-183)

Proceedings Before The Commission

By order of December 20, 1963, this investigation was instituted by the Commission, on its own motion, "for the purpose of ascertaining the adequacy of railroad freight car ownership." All Class I railroads and a selected group of Class II railroads and switching and terminal companies were made respondents. The investigation was conducted without benefit of oral hearing, and on June 18, 1964, Division 3 of the Commission entered an interim report (323 I.C.C. 48) in which it concluded that further study was necessary. By order of July 29, 1964 (M.A. App. 18-28)[3] Division 3 of the Commission broadened the investigation "for the purpose of obtaining detailed and precise information on all phases of freight car ownership, utilization, distribution, rules and practices, which in any manner contribute to or affect the chronic freight car shortage problem, with the view (1) to consideration of the prescription of rules designed to alleviate the problem, and (2) to consideration of the issuance of an order or direction under the provisions of Section 1(13) of the Interstate Commerce Act." This order again named only Class I railroads and a selected group of Class II railroads and switching and terminal companies as respondents (M.A. App. 22-28).[4]

Verified statements, reply statements, and exhibits were filed with the Commission.[5] Evidentiary hearings were held before a Hearing Examiner, beginning on March 28, 1967,

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[3] M.A. App. refers to the Appendix of this Appellee's Motion to Affirm.

[4] By its express terms the Commission's order here involved runs only against such named railroads. Many common carrier railroads, which originate and terminate freight traffic and are under the jurisdiction of the Commission, are not subject to the order.

[5] The evidence before the Commission was introduced through initial verified statements (VS), reply verified statements (RVS), exhibits (Exh.), and oral testimony transcript (Tr.). The identification numbers shown in this brief are those assigned to the documents by the Commission.

and ending on August 11, 1967. In a recommended report evidencing meticulous and comprehensive review of the record, as well as observation of the witnesses, the Examiner concluded that:

> Upon considering all of the evidence the hearing examiner finds that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula, regulations, and car service rules has not been shown to be justified. (Exp. Rep., p. 63, App.).

Approximately eighteen months later, largely and sometimes entirely, ignoring the Examiner's recommended report and findings, Division 3 entered a report (J.S. App. 28-166) and order prescribing the car service rules here in issue for mandatory observance by the theretofore specifically named railroads (J.S. App. 167-68).

Petitions for Reconsideration were filed by the Association, numerous individual railroads and shippers, and shipper organizations. By order of February 18, 1970 (J.S. App. 169-79), the Commission denied the petitions, adopted an exception provision as its Rule 19, and ordered the prescribed car service rules to become effective March 27, 1970. The effective date with respect to Rules 1 and 2 was postponed to July 1, 1970.

Proceedings Before The Court Below

On June 23, 1970, fifteen steel companies and the American Iron and Steel Institute filed this action to enjoin and set aside the Commission's order to the extent it required mandatory observance of Car Service Rules 1 and 2. The Association, the National Industrial Traffic League, and the National Association of Shippers Advisory Boards intervened as parties plaintiff. Following the issuance of a restraining order against the Commission, the cause proceeded to a determination on the merits.

The court below unanimously concluded that the Commission's order prescribing Rules 1 and 2 for mandatory observance did not meet the statutory tests of reasonableness, and pointed to three major deficiencies inherent in the Commission's report: "(1) a failure to find a specific freight car shortage in the owner-lines; (2) a failure to consider the financial effects upon the [non]owner-lines and the shipping public; and (3) a concession that there cannot be more than 80 percent enforcement of regulations, the violation of which carries criminal penalties." (J.S. App. 25.) The court then permanently enjoined the Commission "from enforcing or attempting to enforce that part of the orders of the Commission entered August 21, 1969, February 18, 1970, and March 18, 1970, which direct and require respondent railroads to comply effective July 1, 1970, with Rules 1 and 2." (J.S. App. 27.)

SUMMARY OF ARGUMENT

The questions presented to this Court center on the Commission's improper exercise of the authority granted to it by Congress in Section 1(14)(a) of the Interstate Commerce Act, (App.). No one has questioned, and the judgment of the court below has not impaired, the Commission's power, "after hearing" to establish "reasonable" car service rules. What we do say is that the decision of the court below was correct for the reasons that the Commission's prescription of mandatory Car Service Rules 1 and 2 lacks rational basis and is unreasonably harmful to the railroads and shippers; essential and adequate findings are lacking; support by the substantial evidence of the whole record is wanting; and the Commission failed to observe the statutory requirements, procedural and substantive, of the Administrative Procedure Act and the National Transportation Policy.

The sole proponent of mandatory car service rules was the Commission's Bureau of Enforcement. Opposition to prescription of mandatory car service rules was virtually

unanimous by the shippers, shippers' trade associations and the railroads. In rebuttal statements, and by extensive cross-examination, the Bureau's supporting data was shown to have no substantial evidentiary value. The evidence of record established that mandatory car service rules would have harmful and detrimental effects upon the railroads and the shipping public. The Hearing Examiner concluded that the record did not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership, or the prescription of car service rules. Without adequate explanation, and notwithstanding the absence of essential and adequate findings of fact, and lacking support of the substantial evidence of record, the Commission reversed the Examiner. The court below clearly was correct in setting aside and permanently enjoining the Commission's prescription of mandatory Car Service Rules 1 and 2, and its judgment should be affirmed by this Court.

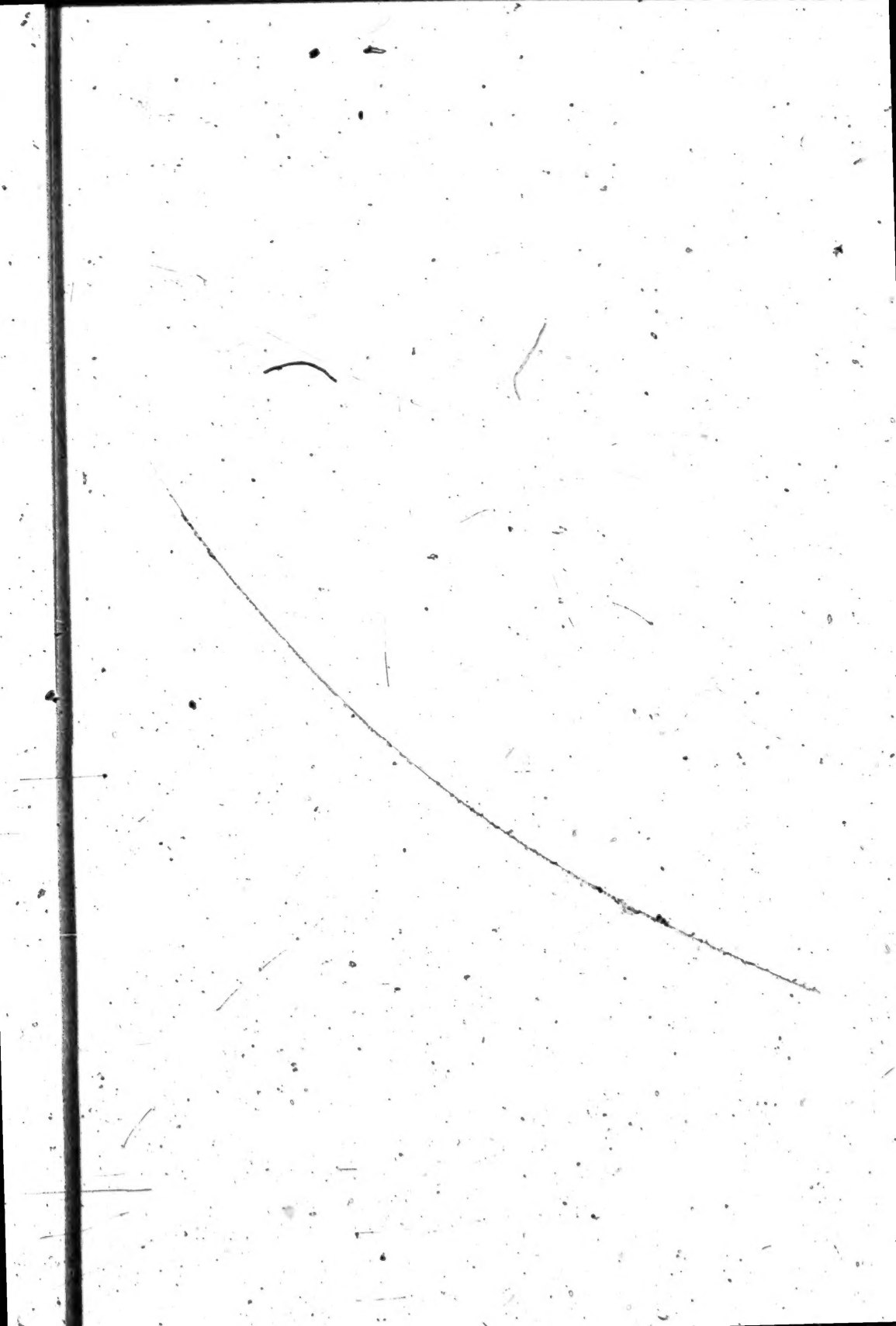
ARGUMENT

The court below was fully aware of and responsive to its role in judicial review of the Commission's decision. It is appropriate to note some of the salient aspects of that review. It began with a recognition of statutory requirements, procedural and substantive, with which the Commission's order must comply, such as the standard of reasonableness required by Section 1(14)(a) of the Interstate Commerce Act (App.) and the "substantial evidence" test of the Administrative Procedure Act, 5 U.S.C. §706(2)(E) (App.). (J.S. App. 13.) Other principles of applicable law were noted. (J.S. App. 16.) The review continued with an examination of the evidence of the "whole record", including the Examiner's findings and conclusions. (J.S. App 15, 18-19, 23-25.) The Commission's report was then reviewed, and compared with the Examiner's report, to determine if essential and adequate findings were present to support its order. (J.S. App. 18.) The court moved on to a determination that, in light of the "whole record", the

Commission's mandatory prescription of Car Service Rules 1 and 2 was invalid.

The court emphasized that a most careful review of the record was required by the Commission's rejection of the comprehensive findings and conclusions of the Examiner with a minimum of explanation. (J.S. App. 18.) In reviewing the extensive record the court was concerned with the Commission's "spartan" findings. (J.S. App. 18.) Accepting the Commission's stated "primary objective" of the prescribed rules, *i.e.*, to increase the availability of freight cars to the car owner (thereby exerting economic pressure on the non-owners to purchase freight cars), the court searched in vain for a finding of a specific freight car shortage on the owner lines, or of the magnitude (absolute or relative) of any owner-lines shortage, or that the owner lines needed the cars or wanted them returned. (J.S. App. 19-20.)

Accepting as fact, for the moment, the Commission's argumentative reasoning that the railroads believed to be deficient in ownership would be forced to purchase cars, the court looked again in vain for findings as to which railroads they were and that such railroads were financially able to do so. (J.S. App. 20-21.) Probing deeper, the court looked at the ultimate effect that mandatory rules would have upon the railroads and shipping public. It noted the voluminous and uncontroverted evidence by railroads and shippers of the harmful effects that would flow from mandatory rules. (J.S. App. 21-23.) In so doing, the court compared the cavalier treatment accorded this evidence by the Commission with the Examiner's considered analysis and evaluation of that evidence. (J.S. App. 23, fn. 7). The court expressed its concern over the admitted fact that it was "unreasonable and, indeed, impossible to expect total compliance with the rules" (J.S. App. 24), and found it unnecessary "to reach the constitutional question" inherent in the imposition of statutory penalties under such circumstances. (J.S. App. 25.)



The meticulous care of the court below to comply with the guidelines and directions enunciated by this Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 492-497 (1951), is to be contrasted to the summary review accorded by the Florida court in *Florida East Coast Ry.* v. *United States*, 327 F.Supp. 1076 (M.D. Fla. 1971). (J.S. App. 184-203.)

In an apparent effort to overcome the deficiencies in the Commission's report and order, noted by the court below, the Government in its brief here (p. 37) urges controlling deference to the judgment and discretion of the Commission and its expertise. However, to do so on the basis of this record would make effective judicial review impossible and administrative expertise "a monster which rules with no practical limits on its discretion." *B. & O. R. Co.* v. *Aberdeen & R. R Co.* 393 U.S. 87, 92 (1968); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962).

I

The Commission's Order Does Not Meet The Tests Of Reasonableness.

In enacting the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, Congress imposed greater responsibility upon the courts to review the reasonableness and fairness of administrative agency decisions. *Universal Camera Corp.* v. *N.L.R.B., supra*, at 490. In the present case there is an additional and special statutory requirement of reasonableness with which this Court must be concerned, 49 U.S.C. §1(14)(a) (App.).

Judicial concepts of what is "reasonable" with respect to car service rules have been expressed in several decisions. Such a rule must serve a useful purpose, improve car service, and not be harmful or wasteful. *Atlantic Coast Line* v. *United States*, 112 F. Supp. 594, 597 (Ct. Cl. 1953). The rule must have a real and substantial relation to the objective sought to be attained and must be susceptible of being

complied with. *Palmer* v. *United States,* 75 F. Supp. 63, 68 (D.D.C. 1947); *Iversen* v. *United States,* 63 F. Supp. 1001, 1006 (D.D.C. 1946), affirmed *per curiam,* 327 U.S. 767 (1946). Mandatory prescription of Car Service Rules 1 and 2 does not meet the statutory tests of reasonableness since such action will not improve freight car service, utilization or supply; will be detrimental and harmful to the railroads and shipping public; and cannot be fully complied with.

A. *Imposing Mandatory Observance Of Car Service Rules 1 And 2 Will Not Improve Freight Car Service, Utilization, Distribution, Or Supply.*

The Government admits that improvement of freight car service, utilization, or distribution was not the intention or purpose in prescribing the rules. (Government Brief, p. 14.) The Government also states that were the Commission concerned only with the distribution of existing freight cars to provide for maximum utilization it might agree that Car Service Rules 1 and 2 should not have been promulgated for mandatory observance since the pattern of movements that mandatory imposition of the rules would create is not one that normally would obtain during periods of car shortages. It is said that here the Commission was addressing itself primarily to the problems of *supply.* (Memorandum In Opposition To Motions To Affirm, pp. 1 and 2).

Implicit in the above admission by the Government is the proposition that, in times of car shortages, maximum utilization of the existing car fleet (as the public interest so obviously requires) is not a matter of primary concern. That such must be the Government's position is made apparent by the Commission's use of its determination in this case of the existence of a car shortage as the sole basis to prescribe rules which its Memorandum admits would establish a pattern of car movement contrary to the achievement of maximum utilization of the existing freight car fleet during a shortage.

The Commission, in past times of car shortage, has recognized an obligation on the railroads to achieve, without regard to car ownership, maximum utilization of the existing car fleet, pointing out that, "[i]n periods like the present, when the car supply falls short of demands, maximum tonnage is handled by permitting cars to be reloaded immediately after a load is removed, without regard to ownership of cars or destination of shipments." *Car Service—Freight Cars*, 268 I.C.C. 687, 690 (1947). Indeed, the Government, at page 2 of its brief below, argued that:

> Given shortages, it is obvious that railroads must follow such practices as will make the best use of what is available.

The court below should not be faulted if, as argued by the Government, it failed to comprehend the Commission's position. It was that in a car shortage situation the Commission may issue an order which does not require railroads to make the best use of what cars are available in order to relieve the shortage but instead requires a pattern of car movements which aggravates the shortage, on the theory that such an order might cause railroads over a period of time to buy more cars.

In no sense then can the Commission's order be defended on the ground that it has a beneficial effect on car utilization or distribution. In fact, the testimony of most witnesses in this proceeding, including Bureau Witness Kline, is that full compliance with car service rules would result in less efficient railroad operations. (Tr. 254, App. · ·.) There remains the sole question of whether the Commission's order can be held to be reasonable because of its assumed effect on freight car "supply" as that term is used by the Government. As so used the term obviously refers to physical units, namely, the number of freight cars in the national car fleet.

Car service rules are related to freight car utilization and distribution, and not freight car supply. During Congres-

sional hearings referred to in the Government brief (p. 7), Commissioner Tuggle clearly defined the purpose of car service regulations:

> There are three distinct aspects of the freight car problem: (1) Reasonable compensation for the use of freight cars (basic per diem); (2) incentive charges designed to encourage the building of more cars; and (3) *car service regulation directed at the equitable distribution and most efficient utilization of available cars.*[6] (Emphasis supplied.)

In its interim report (323 I.C.C. 48,60) the Commission recognized that car service orders do not add cars to the freight car fleet, and there is nothing in the report or record here to show that mandatory Car Service Rules 1 and 2 will add a single car to the existing fleet. Significantly, the Hearing Examiner found there was no persuasive evidence of record that mandatory prescription of Car Service Rules 1 and 2 "would produce improvements in car supply or utilization." (Ex. Rep., p. 42, App. .) Notwithstanding this finding by the Examiner and without citation of any support in the record, the Commission said that "[t]he continuing relocation of cars on owner's lines is of major importance to the maintenance of an adequate car supply." (J.S. App. 63.) The Commission apparently considered that location of cars off the owner's lines created the national car shortage it found to exist. (Government Brief, p. 24.) But the record shows differently. Bureau Witness Robinson said that "[d]islocation of box cars to the point where the vast majority are off owner's line is not, of course, a cause of national car shortages, but rather a result of such conditions." (VS-3, p. 110; App. .) Conceding that there was no statistically demonstrable relationship between the percentage of home cars on line and the adequacy of car ownership or a car shortage (Tr. 2070-71, 2075-76,

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[6] Hearings before the Subcommittee on Surface Transportation of the Committee on Commerce, U. S. Senate, 91st Cong., 1st Sess., June 24-25, 1969, p. 107.

2361-63, 2366-67; App.), the witness concluded that the percentages of home cars on line were not relevant to the adequacy either of the entire freight car fleet or that of an individual railroad. (Tr. 2303-04; App. .) There is no evidence of record to the contrary.

Of significance to the Commission's purported purpose of forcing the purchase of new cars is the testimony of ICC Chairman Stafford in recent Congressional hearings, referred to in the Government Brief (p. 8), that the Commission has "no statutory authority to require the purchase of new cars or the rebuilding of old ones."[7] Here, however, the Commission's order is predicated entirely upon its assumption that by making Car Service Rules 1 and 2 mandatory the Commission will force unidentified railroads to purchase new freight cars. (J.S. App. 65-66; Government Brief, pp. 14, 17, 28.)

The Government gains little by the references in its brief to the Esch Car Service Act of 1917 (pp. 19-24) and subsequent Congressional hearings (pp. 7-8). The legislative history of the Esch Car Service Act reveals that it had nothing to do with car "supply" as that term is used by the Government and dealt only with car movement and distribution. The later Congressional hearings referred to were in connection with legislative proposals for the establishment of "incentive" or "penalty" per diem charges and did not deal with the Commission's authority to establish reasonable car service rules.

B. *Imposing Mandatory Observance Of Car Service Rules 1 And 2 Will Be Unreasonably Injurious And Detrimental To Railroads And Shippers.*

Carefully reviewing the evidence of record (Ex. Rep. pp. 25-27, 42-45; App. ——), the Examiner concluded that

[7] Mimeographed statement dated June 16, 1971, in Hearings Before the Senate Subcommittee On Freight Car Shortages of the Senate Committee on Commerce on S. 1415, S. 1729, S. 1730 and S. 1731, 92d Cong., 1st Sess., p. 3.

"the weight of the evidence, and arguments based thereon, compel the conclusion that mandatory rules would be of substantial detriment to rail carriers and shippers" and would "produce numerous effects harmful to the carriers and the shipping public." (Ex. Rep. pp. 27, 42; App. ——.)

The Government argues in its brief (p. 31) that "the Commission's report answers and refutes each of the Examiner's critical conclusions." It would be more correct to say that the Commission, without citation of any evidence of record, disposed of the Examiner's conclusions by vague and general statements in its report. Note, for instance, the Commission's unconsoling statement that "[w]e are also mindful of the dangers involved in placing restrictions on the use of cars which may hamper the rail lines in providing the type and number of cars required by their individual shippers and which could lead to a loss of traffic to competing modes." (J.S. App. 63) And in the same tenor, the statements that "empty car miles will be reduced in the long run if cars are used in accordance with the rules" and "[w]hile observance of the rules may require some extra switching and short delays, this small inconvenience and perhaps additional expense is a small price to pay for the overall benefits to be derived." (J.S. App. 67)

This record does not establish what benefits would be derived from mandatory car service rules, but it clearly shows the detrimental and harmful effects. The court below had no problem in recognizing those harmful effects. (J.S. App. 21-22.) The evasive language used by the Commission, such as—"may hamper the rail lines"; "which could lead to a loss of traffic"; "will be reduced in the long run"; "may require some extra switching"; "perhaps additional expense"; "small inconvenience"; "small price to pay"—clearly shows how the Commission tip-toed around the Examiner's careful consideration of the evidence and his unqualified finding of detrimental and harmful effect upon the railroads and their shippers.

The Commission points to no contrary evidence and its report manifests an absence of any meaningful consideration of the record and of the Examiner's report. The court below found it impossible to reconcile the Examiner's detailed consideration and conclusion with the generalities indulged in by the Commission. (J.S. App. 21-23) This finding of the court below is further evidence of its compliance with the principles of judicial review contained in *Universal Camera Corp.* v. *N.L.R.B., supra.* In this respect, it is to be contrasted with the utter silence on this point of the court in *Florida East Coast Ry.* v. *United States, supra.*

Even the most superficial examination of the evidence shows the injury that would be inflicted on the affected railroads and their shippers is no "small inconvenience" or "small price to pay." The evidence by railroads and shippers in this respect is overwhelmingly to the contrary.[8] In its zeal to find support on this point the Government quotes from the Commission's report a passage dealing with assigned cars. (Government Brief, pp. 31-32.) We fail to grasp its relevance to the Examiner's finding that mandatory imposition of Car Service Rules 1 and 2 will be detrimental to railroads and shippers, particularly when Car Service Rules 1 and 2 do not apply to assigned cars. See Rule 16(D). (J.S. App. 165).

To further argue harm and injury to railroads and shippers should be unnecessary since the Commission's avowed expectation is that such harm and injury will pressure ship-

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[8] RVS-2, pp. 1-2; RVS-3, p. 3; RVS-12, p. 1; RVS-14, pp. 2-6, 8, 13-14; RVS-24, pp. 20, 59-61; RVS-27, pp. 19-20; RVS-30, pp. 5-6; RVS-32, pp. 40-41; RVS-36, p. 4; RVS-38, pp. 1-2; RVS-40, pp. 3-4; RVS-41, pp. 4-10, 12-13; RVS-43, pp. 2-5; RVS-46, pp. 9-16, 21-24; RVS-58, pp. 7-8, 12-15, 19-20; RVS-67, pp. 2, 4-6; RVS-69, pp. 3, 5-9; RVS-70, pp. 4-7; RVS-72, pp. 2-3; RVS-74, pp. 6-7; RVS-76, pp. 3-4, 6-9; RVS-77, pp. 4-5; RVS-83, pp. 2-3, 5-9; RVS-85, pp. 3-4, 6; RVS-86, pp. 5, 14-16, 22-24, 26-27. (App.____).

pers to in turn pressure railroads to buy more freight cars. The Commission says that such harm and injury will be outweighed by benefits, but nowhere does it identify or measure those assumed benefits. Instead, it relies solely on its expertise and discretion to override the undisputed evidence of record and make meaningless 50 days of hearing.

C. *Full Compliance With The Commission's Order Is Not Possible And Its Exception Provisions Do Not Afford Adequate Relief.*

No rule or regulation should be given the status of law when it is impossible for the railroads to comply with it even after a good-faith attempt to do so.[9] The Bureau anticipated that all major railroads would be in continuing violation of Car Service Rules 1 and 2. (Tr. 1557-58; App. ____.) No attempt would be made to prosecute violations deemed to be efficient or desirable, as they would be reviewed by a "friendly policeman." (Tr. 1559; App. ____.) The Bureau was not sure what penalties would apply for violations, but thought they would range from $100 to $500 for each violation. (Tr. 1561; App. ____.) Such penalties were considered to be only a "license fee" which could be collected from any railroad at any time the Bureau desired to prosecute. (Tr. 1561-62; App. ____.)

The Government does not deny that innumerable violations will inevitably occur. Instead, it argues that a violation would not result in criminal penalties in the absence of a showing of criminal intent. In other words, the railroad respondents should not object to being subject to such penalties, because when brought into court for a violation, they will then have an opportunity to defend against alleged criminal intent.

The Examiner noted the general agreement of all parties of record that complete compliance with Car Service Rules 1 and 2 is impossible, and referred to the Bureau's proposal

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[9] Tr. 254, 256, 1281, 3196; App

that the rules would be administered with "strictly controlled flexibility." He concluded that such proposal might beguile the imagination but did not provide a comprehensible standard of enforcement. (Ex. Rep. p. 24; App. ——.) A witness for the Commission Bureau that would be charged with the administration and enforcement of such rules testified that in his opinion 80 percent compliance would be good, and would be acceptable. (Tr. 1562-65, 1570-73; App. ——.) Even this level of compliance involves a violation rate so high, based on 1964 statistics, that the total amount of possible penalties would be staggering.[10] In considering the reasonableness of mandatory Car Service Rules 1 and 2, the court below found absent an "ascertainable standard of guilt," citing *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89-91 (1921). The court was concerned about, but did not rule upon, possible constitutional questions on this point. (J.S. App. 25.)

The exception provisions are found in Note (B) to Rules 1 and 2 and in Rule 19. (Government Brief, pp. 33-34.) Witness Baumgartner, General Superintendent of Transportation for the Santa Fe Railroad, and former Chairman of the Association's Committee on Car Service, explained that the "inequities" referred to in Note B dealt with such matters as a railroad being required to haul empty cars excessively long distances compared to the loaded haul. (RVS-46, p. 13; App. ——). As he pointed out, Note B, in practice, never dealt with the unpredictable and almost instantaneous needs to deviate from Car Service Rules 1 and 2. With Car Service Rules 1 and 2 prescribed for mandatory observance, advance concurrence of the Car Service Division would have to be obtained under Note B, or ad-

[10] Based upon average weekly loadings in 1964 of 194,318 boxcars a non-compliance ratio of 20% would have meant approximately 39,000 violations a week with respect to boxcars only. Other thousands of violations would have occurred involving gondola cars, hopper cars, and flat cars. (VS-2, Exh. 7).

vance approval of the Commission under Rule 19. In the absence of such advance approval, the loading and movement of a car other than in compliance with Rules 1 and 2 seemingly would constitute violation of the Commission's order.

The Government argues that the Association urged the Commission to adopt an exception provision similar to Rule 19, and quotes from a statement made in the Association's Petition for Reconsideration filed with the Commission (Government Brief, pp. 34-35.) We do not deny that the Association requested the establishment of an exception provision. We did so for two reasons: it appeared at that time that the Commission was determined to prescribe mandatory car service rules in this proceeding and we knew from experience that full compliance with mandatory car service rules was impossible. The Government failed to mention what the Association had to say on page 92 of its Petition for Reconsideration with regard to such proposal:

> This is not to suggest that the railroads invite the imposition of mandatory car service rules or the suggested exception arrangement as an improvement over present conditions. Quite to the contrary—it is our view that even the foregoing exception proposal would be cumbersome, burdensome, and expensive, and of unproven benefit to the railroad industry and to the shippers as a whole. However, such a procedure, cumbersome or burdensome though it may be, is far preferable to the alternative—mandatory rules which are impossible to fully comply with and no provision for exceptions.

The court below noted that the Commission had modified its order to permit certain exceptions to the rules (J.S. App. 16.) However, in the face of a maximum possible compliance of 80 percent, it obviously considered that the exceptions were insufficient to validate the Commission's order. The court in *Florida East Coast Ry.* v. *United States*, *supra*, recognized the seriousness of this problem, but said that

these "relatively minor rough edges" on the Commission's plan should not be allowed to upset it. (J.S. App. 202.) If only "rough edges" were involved, the Association would not be concerned. With mandatory Car Service Rules 1 and 2, the railroad industry would be faced with the serious and practical problem of obtaining the necessary exceptions to continue operations. Railroads operate 24 hours a day, seven days a week. The need for deviation from the rules has no predictable pattern or regularity, but arises on a minute-to-minute, hour-to-hour and day-to-day basis. The need for expedited action at numerous places in the United States will not permit the negotiating and processing which is contemplated under the exception provisions. No procedures have been established as yet for obtaining exceptions, but the Bureau proposal contemplated a system whereby requests for exceptions would be stated in writing to the Commission and would contain a statement of the need for such exceptions and, when approved by the Commission, could then be exercised. (Tr. 1418-19, 1958-59; App. ——.) Transportation officers today frequently will agree over the telephone to make swaps of empty cars, or to handle empty cars other than in conformance with the car service rules, to meet some particular local emergency. (RVS-46, pp. 9-17; App. ——.) Mandatory car service rules will not permit such operating practices even with exception provisions. Under such circumstances, it is unrealistic to even assume that such exception provisions will afford adequate relief. The court below was clearly correct in pointing out this deficiency in the Commission's report. (J.S. App. 25.)

The purported objective of mandatory Car Service Rules 1 and 2 is to increase the nation's freight car supply by depriving shippers on low-ownership lines of freight cars, thereby causing them to pressure those railroads to buy more cars. If the Government is now arguing that because of the exception provisions there will be no real hardships visited upon the shippers located on the low-ownership lines

then, of course, there will be no pressure applied to these railroads, and the expected car building or purchase programs will never materialize. The Government can't straddle the fence and argue both ways on this: either mandatory imposition of the rules will hurt or will not hurt the railroads and shippers. The record clearly shows that mandatory Car Service Rules 1 and 2 will be harmful to all affected thereby.

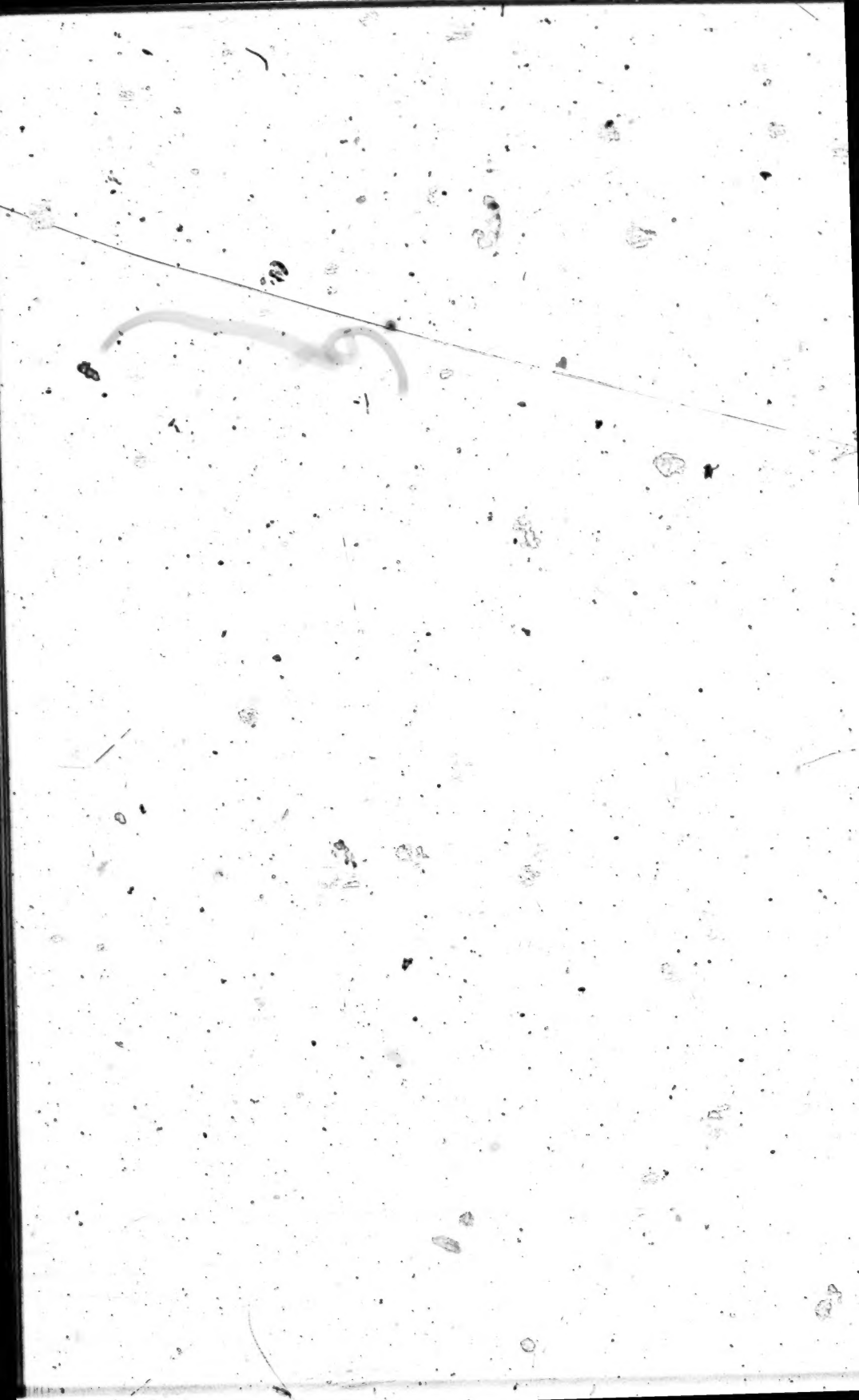
We are firmly convinced that the Commission's Rule 19 cannot adequately take care of the numerous requests for exceptions which would require immediate action.

II

The Commission's Order Lacks The Support Of Findings Essential To Its Validity.

Section 557(c) of the Administrative Procedure Act, 5 U.S.C. §557(c) (App.), provides, in part, that the Commission shall set forth in its reports "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." *Northeast Airlines, Inc.* v. *C.A.B.*, 331 F.2d 579, 586 (1st Cir., 1964). This Court, in *Burlington Truck Lines* v. *United States, supra,* at 167-68, summarized the duty of the Commission in such respects. Even prior to the Administrative Procedure Act this Court had held that the Commission not only must provide a sufficiently complete statement and explanation of its action, but also that the basic or essential findings which serve as a foundation for the Commission's conclusion must be apparent in its report. In the absence of such findings the court is "not called upon to examine the evidence" or "to make findings for the Commission." *Florida* v. *United States,* 282 U.S. 194, 215 (1931).

The first requirement then is that the Commission's report must contain essential and adequate findings to serve as an appropriate premise for the powers which it seeks to exercise under the Interstate Commerce Act. *Secretary of*



Agriculture v. *United States*, 347 U.S. 645, 654 (1954). The Commission's order must be upheld, if at all, "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, supra*, at 169; *American Trucking Ass'n.* v. *United States*, 364 U.S. 1, 13-14 (1960).

A. *The Commission Failed To Make Essential Findings With Respect To Car Shortages Or Car Needs On Owners' Lines.*

The court below was properly concerned with the absence of such findings, pointing to the decision in *Palmer* v. *United States*, 75 F. Supp. 63 (D. D.C. 1947). The absence of such findings there was held fatal to a Commission order designed to compel the return of freight cars to the owning road. In its brief (p. 29) the Government attempts to distinguish the *Palmer* case, but its attempt must fail.

The holding in the *Palmer* case was twofold:

> It follows from all the foregoing that the order of the Commission involved in this action must be set aside, because it is beyond the statutory power of the Commission, *and also because, even if the statutory power existed, this order is not supported by the requisite findings of fact.* (Emphasis supplied.) (*id.* at 76.)

Contrary to the Government's assertion (p. 29, fn. 24), the action of Congress in 1966 in no way overruled the holding in the *Palmer* case with respect to requisite findings.

Having in mind that the purpose of the Commission's order here, as it was in the *Palmer* case, is to require the return of freight cars to the owner lines, it is appropriate to call attention to the nature of those findings so fatally absent in both cases:

> But, even if the Commission had the power it claims, the findings in its report are insufficient to support its order. We have examined the report with care, in an effort to find the obviously requisite determinations. There is no finding that the public interest in the return of cars to the owning railroads outweighs the

> public interest in the prompt movement of freight awaiting shipment at the initial unloading point of the car.
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> • • •
>
> There is no finding that in times of car shortage the necessities of non-owning railroads are less than those of the owning railroads. There is no finding that the present need for cars is on the owning roads rather than on the hiring roads. There is no finding that the roads which serve the large crop areas are owning roads. There is no finding as to what freight needs immediate movement.
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> • • •
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> The opinions and suggestions of several witnesses as to the effect of increased per diem charges, are recited, but no factual data from experience appears, and no underlying fact-finding whatever upon the point; the ultimate conclusion as to that effect is wholly without factual finding in support. (*id.* at 75.)

No argument is needed to establish the essentiality of such inquiries in the case at bar, inquiries which the Commission failed to make. The Commission's failure is particularly significant in light of the admission that 100 percent of home cars could be off line and there still be no car shortage on that railroad. (Tr. 960-63: App. .)

Since its decision in the instant case the Commission has exercised its authority in fixing both basic per diem charges and "incentive" per diem charges. It even more recently has continued to exercise its emergency powers under Section 1(15) of the Act, 49 U.S.C. §1(15), with respect to the return of freight cars to the owner roads. The following comment in the *Palmer* case, under similar circumstances, is most appropriate.

> Furthermore, we are advised that since the argument in this case, and before the briefs were filed, the Commission exerted its emergency power under Section 1(15) of the statute with an operating regulation for car movement, which directly controls the removal and

> return of empty cars, and imposes penalties for non-observance. That Order appears, from a reading of the text, to be a direct action, clearly regulatory in character, upon the same problem and for the same purpose as was the vaguely hopeful, roundabout measure before us in the case at bar. (*id.* at 74)

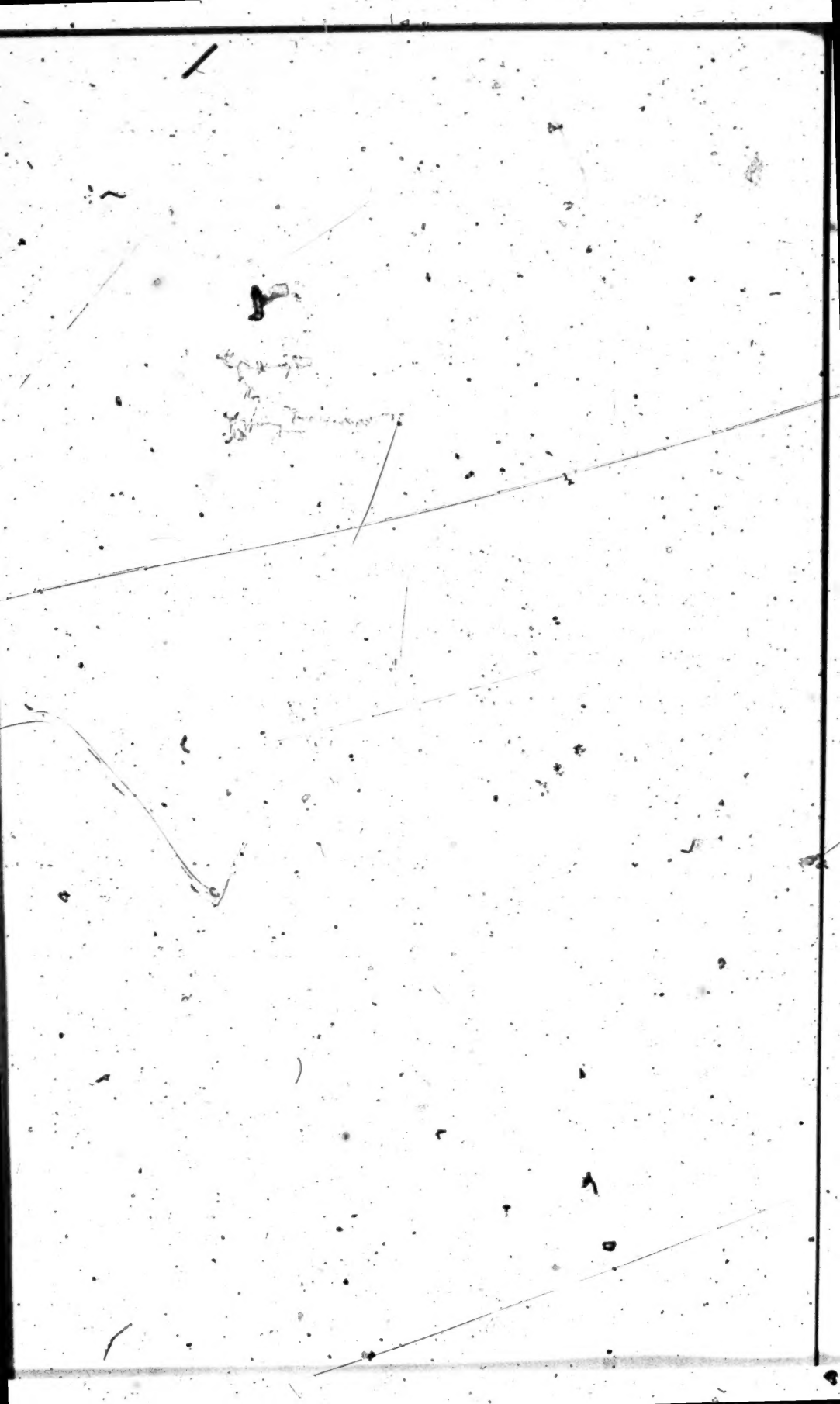
The argumentative reasoning of the Commission in this case that its prescription of Car Service Rules 1 and 2 for mandatory observance hopefully will coerce shippers on unidentified railroads to in turn coerce those railroads to buy an indeterminate number of freight cars at some indefinite time in the future, and without regard to their financial ability to do so, can only be characterized as a "vaguely hopeful, roundabout measure."

The decision in the *Palmer* case stands squarely for the proposition that even though the Commission may have full authority to issue the order in the case at bar such order is fatally defective because of the absence of essential findings.

B. *The Commission Failed To Make Adequate Findings With Respect To The Financial Effects Of Its Order Upon The Railroads And The Shipping Public.*

The court below expressed its concern about the failure of the Commission to give adequate consideration to the financial effects that mandatory Car Service Rules 1 and 2 would have upon the railroads and the shipping public. (J.S. App. 21.) It pointed to the absence of any conclusion or finding in the report as to the financial ability of the unidentified railroads, which are assumed to be deficient in car ownership, to purchase the undetermined number of additional cars which the Commission said they would be forced to buy. (J.S. App. 20-21.) Again, the Government argues in its brief (p. 30) that such findings are unnecessary.

The avowed purpose of the Commission's order is to place economic pressure upon some unknown railroads (assumed to be deficient in freight car ownership) to purchase new



freight cars. The court in *Palmer* v. *United States, supra,* at page 70, said:

> The statute does not provide that these problems be left to the chance decisions of the separate roads, each answer depending upon the road's ability to endure the financial pressure. . . .

Transportation service is not simply measured by freight car supply alone. Many other factors are involved and many types of capital expenditures. The acquisition of new freight cars must be accommodated to the other capital demands upon a railroad. The ability of any railroad to carry out a car acquisition program is governed by its ability to obtain capital funds. The railroad industry as a whole has been under a severe handicap since the conclusion of World War II because of its over-all low rate of return on investment.

The Commission cannot plead ignorance of the railroads' financial condition for its Annual Reports to Congress show this trend strikingly, and confirm beyond any question that the railroad industry has been subject to progressive financial anemia. (See annual rates of return for period 1960-1969; ICC 84th Annual Report—1970, p. 134.) The court below pointed out that the Commission was aware of the industry's financial problem in the very year of its decision, quoting from its 83rd Annual Report (1969), at page 72. (J.S. App. 21.) Despite all this, the Commission gave no consideration in its report to the financial impact that the prescription of mandatory car service rules would have upon the railroads.

C. *The Commission Failed To Make The Jurisdictional Finding That Its Prescription of Mandatory Car Service Rules 1 And 2 Was Reasonable.*

When Congress delegates a power to an administrative agency the statute delegating such authority must contain limitations or standards governing the exercise of that power. *United States* v. *Chicago, M.St.P.&P. R. Co.*, 282

U.S. 311, 324 (1931). Some of the standards which this Court has considered and held to be adequate include "just and reasonable", "public interest", and "public convenience, interest, or necessity."[11] Under the authority granted to the Commission in Section 1(14)(a), the standard is "reasonable" rules or regulations. *United States* v. *Southern R. Co.*, 250 F. Supp. 759, 761 (M.D. Ga. 1966), reversed on other grounds, 380 F.2d 49 (4th Cir. 1967).

Commission orders have been held void for lack of a finding on the essential fact conditioning its exercise of power and such quasi-jurisdictional finding cannot be left to assumption or inference. *Florida* v. *United States*, *supra*, at 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U.S. 454, 464 (1935). (See, also, *City of Yonkers* v. *United States*, 320 U.S. 685, 691 [1944].)

Recently, in *American Telephone and Telgraph Co.* v. *F.C.C.*, 449 F.2d 439, 447 (2d Cir. 1971), the Court of Appeals found that lack of a finding, in the precise words of the statute, that the prescribed practice would be "just, fair, and reasonable" was fatal to the order there involved. The court said it could not accept "the Commission's characterization of its finding as the semantic equivalent of that required by the statute" and that "it is settled that the absence of a basic or jurisdictional finding of the kind here involved cannot be justified on the ground that some other and different finding by inference or implication meets the statutory standard." (*id.* at 451.)

An indispensable finding which the Commission failed to make in its report or order was that such rules would be reasonable when prescribed for mandatory observance. Normally such a finding of ultimate fact is expressed in the

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[11] *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 435 (1930); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932); *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

language of the statutory standard. See, *e.g., Wichita Railroad & Light Co.* v. *PUC*, 260 U.S. 48, 59 (1922). Despite the voluminous evidence of record that imposition of mandatory Car Service Rules 1 and 2 was not reasonable, the Commission's report and order is silent on this basic jurisdictional fact.

Accordingly, the Commission's order is void for lack of a jurisdictional finding that Car Service Rules 1 and 2 when prescribed for mandatory observance are "reasonable" rules.

D. *There Are No Findings Affording A Basis Upon Which To Determine Whether The Commission's Order Comports With The National Transportation Policy.*

It is impossible to determine from the Commission's report how the prescription of Car Service Rules 1 and 2 for mandatory observance is consistent with Congressional directives contained in the National Transportation Policy. (App. .) The provisions of the National Transportation Policy are not mere window dressing without practical significance in terms of the Commission's powers and functions. *I.C.C.* v. *N.Y., N.H. & H.R. Co.* 372 U.S. 744, 761 (1963). Indeed, it is "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 87-88 (1957). The National Transportation Policy provides that "[a]ll of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Thus, the powers of the Commission under Section 1(14)(a) of the Interstate Commerce Act are to be exercised with a view to carrying out the provisions of the National Transportation Policy. Among those policy provisions are: "fair and impartial regulation", the intention to "promote . . . adequate, economical, and efficient service" and to "foster sound economic conditions in transportation and among the several carriers."

The evidence of record establishes and the Examiner found that mandatory observance of Car Service Rules 1 and 2 would not improve freight car service, utilization, distribution, or supply. The court below found nothing to support a contrary conclusion. The Government admits that improvement of utilization and distribution was not intended to be achieved by the Commission's action and further admits that in times of car shortage the patterns of movements that would be required by the Commission's order are contrary to the patterns that would normally produce the most efficient utilization of available freight cars during such periods of car shortage. (pp. 10-13, *supra.*)

The evidence establishes, the Examiner found, and the court below concluded that imposing mandatory observance of Car Service Rules 1 and 2 would be unreasonably injurious and detrimental to the railroads and their shippers. Moreover, the Commission's order relies upon coercion to achieve its intended results, prefers some shippers over others, and discriminates between competing railroads themselves and between the railroad industry and its competitors in other modes of transportation. (pp. 13-16, *supra*; pp. 34-35, *infra*)

The Commission was fully aware of the poor financial condition of the railroad industry generally, yet failed to consider the financial impact of its action upon the railroads. (pp. 23-24, *supra.*)

The action of the Commission is clearly contrary to the provisions of the National Transportation Policy and its report contains no indication of any consideration by the Commission of the provisions of that Policy. The Commission has offered no explanation as to how its action could possibly be in keeping with those provisions. While specific reference by the Commission to the National Transportation Policy is unnecessary, if its report and findings—

> . . . do not provide [the] Court with a basis for determining whether the Commission's decision comports

> with the National Transportation Policy, that decision must be set aside . . . (*Schaffer Transp. Co., supra,* at 92.)

See, also, *Roadway Express, Inc.* v. *United States*, 213 F. Supp. 868, 877-78 (1963), affirmed *per curiam*, 375 U.S. 12 (1963).

Failure of the Commission to provide a basis by which to determine whether its action comports with the National Transportation Policy is given added significance by the recognition of the court below that shippers and the railroads are united in opposing the mandatory rules. (J.S. App. 22, fn. 6.)

III

The Commission's Order Lacks Support By Substantial Evidence Of The Whole Record And Is Arbitrary And Capricious.

In Ex Parte 252—*Incentive Per Diem Charges*, 332 I.C.C. 11, 14 (1967), the Commission recognized that "Section 1(14) (a) differs from section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 U.S.C. §551, *et seq.*" Section 556(d) of the Administrative Procedure Act, 5 U.S.C. §556(d) (App.), provides that the proponent of a rule or order has the burden of proof and that the rule may not be issued "except upon consideration of the whole record . . . and supported by and in accordance with the reliable, probative and substantial evidence." That burden of proof has not been met by the proponent of mandatory car service rules and the Commission's order is not supported by reliable, probative and substantial evidence of the whole record.

A. *The Commission Failed To Accord Proper Weight To The Report And Findings Of The Hearing Examiner.*

Consideration of the "whole record" required the court below to carefully evaluate the findings and conclusions of

the Hearing Examiner "who has observed the witnesses and lived with the case." The Examiner commented on the inability of Bureau witnesses to stand cross-examination on the impact of mandatory rules. (Ex.Rep., p. 23; App. .) His findings and conclusions, being in conflict with the Commission's ultimate findings and conclusion, could render any "evidence supporting [the] conclusion . . . less substantial." *Universal Camera Corp., supra,* at 496.

As the court below pointed out (J.S. App. 22, fn. 6), the concept of mandatory rules originated in and was advocated solely by the Commission's Bureau of Enforcement. The Commission's report, and in turn its order, are predicated almost entirely upon the evidence submitted by Bureau Witnesses Kline and Robinson.

All the tables set forth in the Commission's report are taken from Witness Kline's statement (VS-2, Exh. 1-6). The testimony and exhibits sponsored by Witness Kline were thoroughly discredited in reply statements (RVS-23; RVS-47) and during cross-examination. Recognizing that many factors, in addition to the numbers of railroad owned cars, were relevant and essential to a determination of the adequacy of the national freight car fleet, the witness stated that such factors had not been considered.[12] He was the first to concede that the car shortage data was statistically unreliable.[13] He even conceded that such data did not show inadequacy in the carrier fleet. (Tr. 132; App. .) Witnesses Reider and Robinson were of the view that there was nothing in the record which would enable anyone to determine whether the ownership of any particular carrier was inadequate. (Tr. 1683-85, 2362-63; App. .) In fact, both Witnesses Reider and Kline admitted that at the time of the hearing there was no substantial freight car shortage. (Tr. 1230, 1402, 1528; App. .)

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[12] Tr. 108, 143-44, 196-98, 211, 221, 239, 247-48, 302, 342-43, 348-50; App.

[13] Tr. 27, 30, 32-33, 37, 54-55, 143, 180, 237, 249; App.

In *Incentive Per Diem Charges, supra*, at 17-18, the Commission characterized similar, and in most instances identical, evidence as being entitled to little weight and insufficient to support any valid conclusions. In a later report in that same proceeding (337 I.C.C. 183) the Commission described the lack of evidentiary worth in the statistical information of record in the case here at bar saying:

> At the time we issued the prior report, the only information which was available to us directly bearing on the adequacy of the national car supply was contained in the so-called CS-44 reports of member railroads to the Association of American Railroads and a 1-month study made by the railroads in connection with the proceedings in Ex Parte No. 241. . . . The railroads expressed reservations and criticisms of these data, leading us to find in the prior report that the data in those reports could be given little weight.
>
> We, therefore, recognized in our prior report a need for data systematically collected on scientific bases which would show the demand for railroad freight cars, the supply of cars on hand to meet such demand, and the manner and extent to which the demand was met. We then saw, for example, only an unsatisfied demand for cars without any indication of the extent to which surplus cars could be used to meet the unsatisfied demand. We expressed our concern with the paucity of data then before us and stated that, "An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types." (337 I.C.C. at 184-85)

In view of the Commission's own characterization of the statistical evidence in this proceeding, how could it fault and overrule the Examiner for arriving at a like conclusion? The Commission attempts to explain this remarkable shift of gears by saying that in each instance it was riding in a different vehicle. (J.S. App. 86-87). Such explanation ignores the fact that in this and the other pro-

ceeding the Commission was exercising powers conferred upon it by a single section of the Interstate Commerce Act, namely, Section 1(14)(a). Further, such explanation ignores the fact that in this proceeding the Bureau's staff agreed that the information relied upon was of little, if any, probative value.[14] The admissibility and weight of the data were also questioned by the railroad respondents.[15] The reasons for the dubious value are many, but the primary reason is that they overstate demands during peak periods. (Tr. 27, 37, 257, 295-96; App. .) Witness Kline believed that they were "grossly misleading." (Tr. 1254; App. .) He admitted his failure to consider reported car surpluses with regard to adequacy (Tr. 60, 100-02, 1228; App.), and that the use of a 24-hour yardstick to satisfy shippers' demands for cars was very arbitrary and unreasonable. (Tr. 1235-36; App. .)

The Examiner discussed at length the weaknesses in this evidence. Among other things, he pointed out that:

> Even if the reported shortages were not subject to the foregoing incompetencies, their use without recognition of concurrent surplusages of freight cars would be unreasonably biased. The record contains the CS-44 reports for the period from January 1, 1955 through the week of July 15, 1967. During such interval of 653 weeks there were more freight cars reported surplus than short during 526 weeks; the last week in which shortages were reported in excess of surpluses began on November 19, 1966. (Ex. Rep., p. 22; App. ,)

Indeed, a compilation based upon Appendix A to RVS-25 reveals that during the year 1964 the reported surpluses exceeded reported shortages of box cars during seven of the twelve months. Only in the months of January, February, October, November and December were reported shortages

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[14] Tr. 26-27, 179, 221, 237, 296, 1242-43, 1248-49, 1473-74; App. .

[15] Tr. 2661-63, 2694-95, 3418-19, 3569, 3833-34, 4491, 4660-61, 4667; App. .

in excess of reported surpluses. Under such circumstances there can be no "continuing" or "chronic" shortage nationwide for such a year. (Tr. 101-02,; App. .) Perhaps this explains why a later 1968 study, conducted in Ex Parte 252 (Sub-No. 1)—*Incentive Per Diem Charges—1968*, 337 I.C.C. 217, led the Commission there to conclude that the supply of general service box cars was inadequate to meet the demands for such equipment during only the six-month period September through February, and that "the individual need of particular carriers for cars in the March through August period can be remedied by service orders or car distribution directives." (*id.* at 220, 223, 226.)

In an attempt to support his proposal for mandatory car service rules, Witness Robinson submitted exhibits (VS-3, Ex. 24-28) based upon certain Commission field agents' reports. Such reports, in most cases, were not prepared in the ordinary course of business, but were prepared and collected solely for use in this proceeding. (Tr. 818, 938; App. .) These reports were then reviewed by three members of the Commission's Bureau of Operations staff, Witnesses Reider, Robinson and Kline. Only those reports showing "bad practices" were selected for use in this proceeding (Tr. 787-88; App.) and for the express purpose of strengthening the Bureau's case. (Tr. 1674-75; App. .)

The instructions for the preparation of these reports were issued by regional directors urging the field agents to produce more "good" (bad practice) reports. (Tr. 811-812; App. .) When questioned as to why no attempt was made to have an objective investigation and study made, so that the Commission might have a full view of the good as well as bad car handling practices, the reply by the Bureau's witness was simply that the Bureau had "neither the staff nor the time" to make such an objective study. (Tr. 2228; App. .)

There was no pretense or indication that the analysis, the so-called "studies", or the field agents' reports were made in conformity with any scientific sampling techniques or procedures. (Tr. 1662-63, 2179-80; App. .) The Examiner, in considering the same evidence and its method of selection, concluded:

> In many instances an attempt is made to support the proposed regulation or rule by an exhibit, but in some instances no evidence is offered. The exhibits are generally based on reports from field agents who were instructed to seek evidence concerning so called bad practices to be used in support of the various proposals. To say that this method of gathering evidence does not produce a representative showing is a gross understatement. As a matter of fact, it goes beyond a statistical bias to such an extent as to be completely weighted against the respondents and in support of a proposed regulation or rule. Or as one witness stated the bad practices only were shown because it was assumed that respondents would present evidence relative to good practices. (Ex. Rep., p. 23; App. .)

There was no evidence submitted nor inquiry made by the Commission with respect to many factors conceded to be necessary to any determination of the adequacy of the freight car fleet and the efficiency of the utilization of that fleet. (See footnote 12, *supra*, p. 29) The Examiner recognized the essential nature of those missing factors:

> In connection with the adequacy of freight car ownership it should be noted in passing that the record contains no quantitative information as to the available substitution of cars, nor facts such as those normally developed through market research. Such data, as stated by the Commission in . . . *Incentive Per Diem Charges, supra*, are essential to conclusions regarding the adequacy of the freight car fleet. (Ex. Rep., p. 17; App. .)

He concluded that:

> Upon considering all of the evidence, the hearing examiner finds that the record does not contain com-

petent evidence upon which to base a conclusion as to the adequacy of freight car ownership. (Ex. Rep., p. 63; App. .)

In the Commission's report (J.S. App. 51-52) and in the Government brief (p. 9) it is said that the Bureau concluded there was a national freight car deficiency of 111,042 cars, or 7.66 percent of the railroads' total car ownership. This is a reference to page 10, Exhibit No. 1, accompanying VS-4, offered by Witness Gunderson. This witness, however, introduced a later verified statement (VS-4, Part 2), revising his previous statement and eliminating pages 2 through 11 of his Exhibit No. 1. The witness and counsel for the Bureau stated that, in light of the revised testimony of the witness, the statistical information contained on pages 2 through 11 of his Exhibit No. 1 no longer had any relevance. (Ex. Rep. p. 17; Tr. 394-96, 1684-85; App. .)

In its report the Commission places great emphasis upon the percentage of box cars owned located on owners' rails. (J.S. App. 53-55, 63.) We earlier pointed out that the percentage of home cars on line has no necessary causal relationship to freight car shortages. We here point to the fact that all evidence of record showing percentage of home cars on owners' lines is confined to box cars only and mostly to plain box cars. Thus, there is no evidence of record as to the percentage of home cars on line of any type of freight car other than box cars. Nevertheless, the Commission's order runs against all types of freight cars.

B. *The Order Of The Commission Creates Discrimination And Inequities As Between Railroads.*

The Commission's order runs only against railroads named respondents by the Commission's order of July 29, 1964. (M.A. App. 22-28). Many common carrier railroads, which originate and terminate freight and which are subject to the jurisdiction of the Commission, are not subject to the order. Notwithstanding this fact, and the resulting discrimination against the named railroads and in favor of

the omitted railroads, the Commission's report states that it is prescribing rules "to be observed by all carriers at all times." (J.S. App. 62.) In its Jurisdictional Statement (pp. 7-8) the Government asserts that the rules at issue govern the disposition of freight cars of all the nation's railroads and that "[s]uch rules must be uniformly applied to all roads to avoid discrimination and inequities." When, however, in this Association's Motion to Affirm, the discriminatory situation referred to was pointed out, the Government backed away from the statements in the Commission's report and in the Jurisdictional Statement as to the necessity for application of the order to all railroads and said simply that the order applied "to all Class I railroads, which are those with annual operating revenues of $5,000,000 or more." (Memorandum in Opposition, pp. 4-5.) If discriminatory treatment is to be based upon size or operating revenues, certainly there should be some finding, based upon evidence of record, as to why such action is necessary and proper.

This type of conflict between a Commission report and its accompanying order, namely, a finding that the rules must "be observed by all carriers at all times" and an order running only against certain named railroads (J.S. App. 167), is similar to that involved in *Chicago, R. I. & P. Ry. Co.* v. *U.S.*, 284 U.S. 80. There the Commission's finding was with respect to all railroads but its order excepted certain railroads. This Court said:

> Plainly this order is in flat opposition to the finding and cannot be permitted to stand. (*id.* at 96.)

C. *The Commission's Order Is Predicated Upon Matters Of Which It Took Official Notice Contrary To The Requirements Of The Administrative Procedure Act And Its Own Rules Of Practice.*

It was assumed by the Association that any Commission order in this case would be based upon reliable, probative

and substantial evidence of the "whole record." In its report, however, the Commission based its action upon

> . . . the evidence adduced and official notice taken of congressional hearings, numerous complaints by shippers to the Commission, and various studies made in and outside the Commission, . . . (J.S. App. 87.)

By such official notice the deficiencies in the record were sought to be met. The Commission changed its course from a proceeding instituted to obtain "detailed and precise information' to one taking official notice of unidentified data outside the record.

The Hearing Examiner concluded "that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership." (Ex. Rep. p. 63; App.) The Commission side-stepped the Examiner's conclusion that competent evidence was lacking of record by taking official notice of "congressional hearings, numerous complaints by shippers to the Commission, and various studies in and outside the Commission." Such action was inconsistent with its affirmance of the Examiner's ruling on other inadmissible evidence:

> . . . we agree with the examiner that the statements stricken therein are inadmissible since they are in the nature of hearsay or conclusions based mainly on material that would not lend itself to cross-examination. (J.S. App. 32.)

The Association agrees with the Commission's rejection, indeed exclusion from the evidence, of such material and statements as being "in the nature of hearsay," or because it "would not lend itself to cross-examination," or because the respondent railroads had no opportunity to rebut. Such ruling by the Commission was eminently correct, but having done so how could it then rest its action upon "official notice taken of congressional hearings, numerous complaints by shippers to the Commission, and various studies made in and outside the Commission"? The Government's

brief here makes no effort to explain such inconsistent action by the Commission, but in its brief before the court below (p. 15) it argued that the error, if any, was not prejudicial since the Commission's finding was "fully supported by the record in any event"—an argument entirely inconsistent with the Commission's stated reliance on the matters of which official notice was taken.

The Commission's action in taking official notice of such data was a violation of the Commission's General Rules of Practice regarding the submission and admission of evidence.[16] Under the Commission's own rules, it has held that "official notice" does not extend to the data, records, or studies in other hearings or proceedings.[17] An administrative agency is bound by its own procedural rules, even though the establishment thereof may have been within its sole discretion. *Pacific Molasses Co.* v. *Federal Trade Commission*, 356 F.2d 386, 389-390 (5th Cir., 1966); *Mississippi Valley Barge Line Co.* v. *United States*, 252 F.Supp. 162, 166 (E.D. Mo. 1966), appeal dismissed, 385 U.S. 32 (1966).

The Commission, in its "official notice" action also violated Section 556(e) of the Administrative Procedure Act, 5 U.S.C. §556(e) (App.), requiring the Commission, when its decision rests on official notice of a material fact not in the evidence of record, to afford affected parties "an opportunity to show to the contrary." *Glendenning* v. *Ribicoff*, 213 F.Supp. 301, 302-03 (W.D. Mo. 1962); *Sosna* v. *Celebreeze*, 234 F. Supp. 289, 290 (E.D. Pa. 1964). The Association's petition for reconsideration was denied by the Commission.

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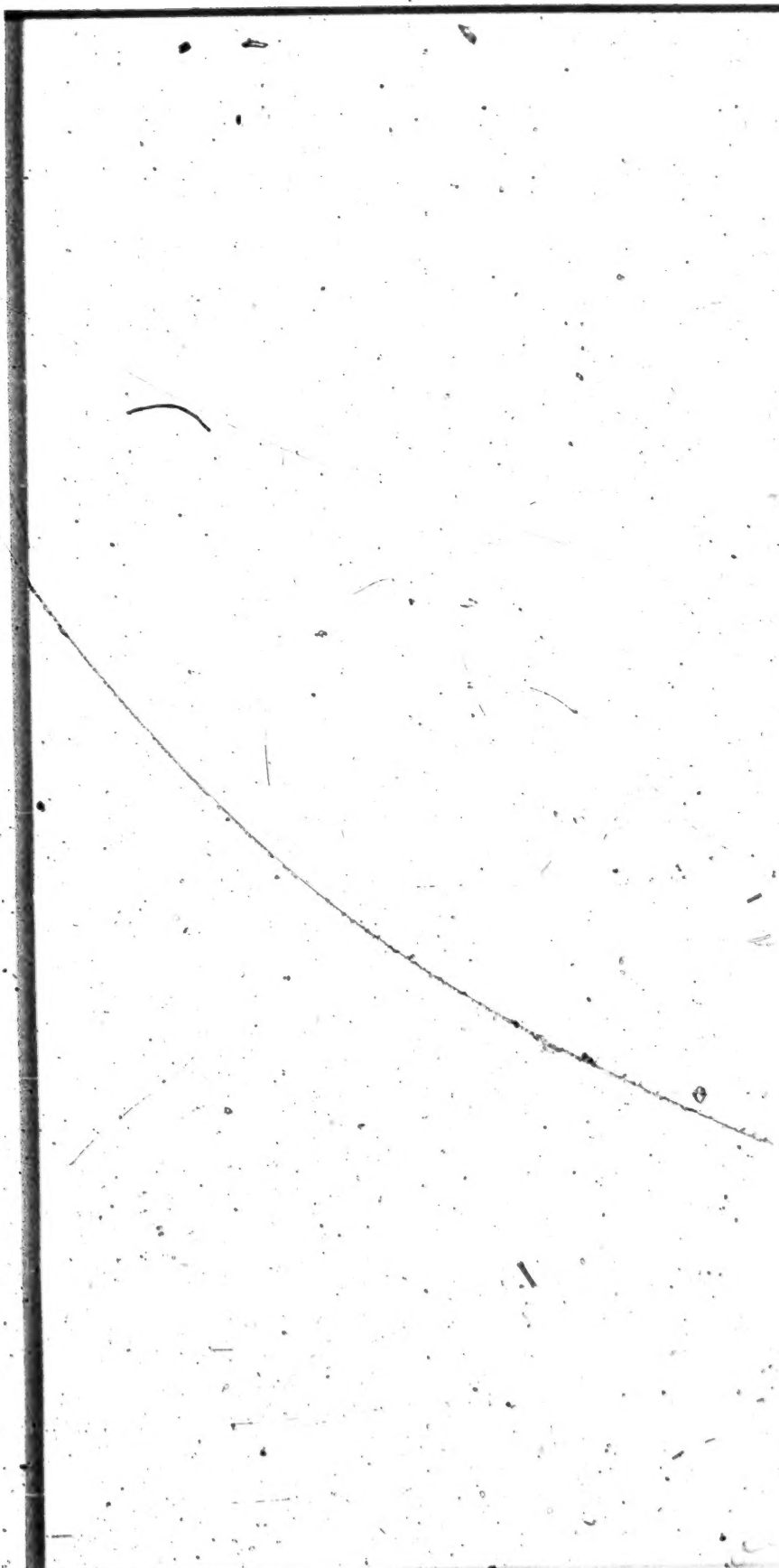
[16] Rules 75 to 87 of the Commission's General Rules of Practice, Chapter X, 49 C.F.R. Part 1100.

[17] See *St. Johnsbury Trucking Co., Inc. Extension-Heavy Hauling*, 53 M.C.C. 277, 289 (1951); *Watson Bros. Transp. Co., Inc.-Purchase-S. & C. Transport*, 70 M.C.C. 317, 318 (1956); *Blytheville Chamber of Commerce* v. *Aberdeen & R. R. Co.*, 259 I.C.C. 201. 210, fn. 4 (1944).



At oral argument before the court below Commission counsel, apparently having some doubt about the Commission's official notice action, argued that what the Commission really had in mind was various other proceedings. The Government brief in this Court, (pp. 7-8) contains the same argument. The court below apparently was unimpressed by these *post hoc* rationalizations of counsel in an effort to provide support for the Commission's official notice action. The Commission's action must be judged by what is contained in its report and not upon after supplied reasons and rationalizations of counsel. *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444 (1965). The Commission's consideration and reliance upon such matters outside the record was prejudicial and reversible error. *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93-94 (1913); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 58, 74 (1935); *United States* v. *Abilene & So. Ry Co.* 265 U.S. 274 (1924).

The Commission's use of "official notice" here is similar to that condemned by this Court in *Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937). This Court's condemnation of such action bears repeating here:

> . . . . Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial.
>
> What was done by the Commission is subject, however, to an objection even deeper. There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process —the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the

Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.

* * *

This will never do if hearings and appeals are to be more than empty forms. (*id.* at 302-03.)

CONCLUSION

For the foregoing reasons, the judgment of the District Court below should be affirmed.

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Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORP., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR
THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. The District Court Correctly Found That Mandatory Observanee Of Car Service Rules 1 And 2 Was Not Reasonable And The Commission Had Failed To Make Certain Necessary Findings	3
A. The Code Of Car Service Rules And The Esch Car Service Act Were Developed To Deal With Car Distribution	3
B. The Commission's Conclusion That Car Service Rules 1 And 2 Will Increase Car Ownership Was Without A Rational Basis And Was Unsupported By Substantial Evidence	5
C. The District Court Correctly Held That It Was Necessary For The Commission To Make Specific Findings Of Car Shortage On Individual Railroads And Of Their Financial Capability To Acquire New Equipment	9
D. The District Court Correctly Found The Rules Were Not Reasonable Because Of Their Adverse Financial Effects On The Shipping Public	11
E. The Commission's Handling Of The Examiner's Recommended Report And Order Was Improper	12
II. The District Court Properly Found The Rules Unreasonable For Lack Of A Comprehensible Standard Of Enforcement	14
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Armour Packing Co. v. United States, 209 U.S. 56 (1908) 16

Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 16, 17

Florida East Coast Ry. Co. v. United States, 327 F. Supp. 1076 (M.D. Fla. 1971) 8, 10

Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841 (D.C. Cir., 1971), cert. den. 402 U.S. 923 . . . . . 13, 17

United States v. Southern Railway Co., 250 F.Supp. 759 (D.S.C. 1966) 16

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 13

Administrative Decisions:

Car Supply Investigation, 42 I.C.C. 657 (1917) 4

Incentive Per Diem Charges–1968, 337 I.C.C. 183 and 217, sustained on review *sub nom.* Long Island R. Co. v. United States, 318 F.Supp. 490 (E.D.N.Y.) and reversed and remanded in Florida East Coast Ry. Co. v. United States, 322 F.Supp. 725 (M.D. Fla., 1971), appeal pending in this Court, No. 70-279 7

Statutes and Regulations:

Interstate Commerce Act

Section 1(14)(a) (Esch Car Service Act of 1917, 40 Stat. 101, as amended in 1966, 80 Stat. 168), 49 U.S.C. § 1(14)(a) 4

Section 1(17)(a), 49 U.S.C. § 1(17)(a) 14

Section 10(1), 49 U.S.C. § 10(1) 14

Section 41(1), 49 U.S.C. § 41(1) 14

Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* 9, 11, 16

Congressional:

H. Rep. No. 1183, 89th Cong. 2nd Sess. (1966) 5

Interstate Commerce Commission Annual Reports:

31st Annual Report (1917) 4

78th Annual Report (1964) 4

79th Annual Report (1965) 4

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BRIEF FOR THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

QUESTIONS PRESENTED

The ultimate question presented here is whether the district court was correct in enjoining and setting aside the Commission's order prescribing Car Service Rules 1 and 2 for mandatory observance by the nation's railroads. These rules require the railroads to return foreign freight cars, either loaded or empty, to the railroad owning them. The Commission's order was promulgated in an attempt to increase the number of cars owned by the railroads as a group.